defendant contended that the plaintiff was only the owner of the land but not of the houses, the houses in questions were part of the land in which they stood and were thus the property of the proprietor of the land. The conclusion I have arrived at in the present appeal appears to me to be entirely in accordance with that decision.

The other case is *Hiew Kim Swee v. G. C. Gomez*[6] which deals with the other point raised before me as to what is a *bona fide* question of title. Here again the opinion I have expressed in this judgment appears to be entirely in accordance with the decision of Thomson J.

Had it been possible, therefore, for these two cases to be cited before me I should have followed them and I should have reached the same conclusions. I would only add, in view of the fact that *Hiew Kim Swee's*[6] *case* dealt with a Magistrate's jurisdiction, that in my view section 71 of the Courts Ordinance, which deals generally with any action or suit before a Sessions Court, does not affect the construction which has been placed by Thomson J. on sub-section (4) of section 70.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Solicitors: *Lim, Lim & Oon; Presgrave & Matthews.*

SUPRAMANIAM v. KANTHASAMY

[A.Cr.J. (Spenser Wilkinson J.) October 15, 1955]

[Penang — Criminal Appeal No. 39 of 1955]

Criminal trial — Plea of guilty — Necessity of recording statement of facts.

In this case the appellant pleaded guilty on a charge of voluntarily causing hurt under s. 323 of the Penal Code. No statement of the facts were called for or recorded.

Held: the Courts have frequently laid down that upon a plea of guilty the Magistrate must either take evidence or a statement of the facts and record them and as this was not done in this case the conviction must be quashed.

MAGISTRATE'S CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J. : — The appellant in this case was charged with voluntarily causing hurt to the respondent under section 323 of the Penal Code.

Upon his first appearance before the Magistrate's Court he claimed trial but upon a subsequent appearance he pleaded guilty.

The learned Magistrate recorded the plea and convicted him thereon. No statement of the facts, however, was called for or recorded and the appellant alleges that had the facts been outlined it would have been apparent that he did not intend to plead guilty to the charge.

The Courts have very frequently laid down that upon a plea of guilty the Magistrate must either take evidence or a statement of the facts and record them. As this had not been done in this case I quashed the conviction and remitted the case to the Magistrate for retrial.

Retrial ordered.

PAPATHY v. PUBLIC PROSECUTOR

[C.A. (Mathew C.J., Spenser Wilkinson and Hill JJ.) October 12, 1955]

[Ipoh — F.M. Criminal Reference No. 2 of 1955]

Criminal Procedure — Joint trial of cross-summonses — Whether this is an illegality or irregularity — Criminal Procedure Code (Cap. 6), ss. 170 & 422 — Courts Ordinance, 1948, s. 34.

This was a criminal reference under s. 34 of the Courts Ordinance, 1948, on a certificate of the Public Prosecutor. The point raised for determination was whether the joint trial of cross-summonses is an illegality or an irregularity.

The procedure adopted by the learned Magistrate was to hear one of the two cases, i.e. PP. 2080/53 first. The complainant and his witnesses gave evidence and they were cross-examined by Counsel for the defence. At the close of the case for the prosecution the learned Magistrate made the following note — "Complainant in PP. 7/54 to state her case and answer the charge". The two complainants in that case and one of the defence witnesses were then examined and cross-examined by Counsel for the complainant in case PP.2080/53. The learned Magistrate then found the present appellants who were the accused in case PP.2080/53 guilty.

Held: the procedure followed by the Magistrate was not in accordance with the provisions of the Criminal Procedure Code and therefore the trial was bad and cannot be cured by recourse to s. 422 of the Code.

Cases referred to :—

(1) *Pulukuri Kotayya v. King-Emperor* 21 I.A. 65.

(2) *Dhako Singh v. Emperor* A.I.R. 1920 Patna 177.

(3) *Queen v. Sheikh Bazu* (1867) 8 W.R. 47.

(4) *Sahadev Ahir v. King-Emperor* 8 C.W.N. 344.

(5) *Subrahmania Ayyar v. King-Emperor* I.L.R. 25 Mad. 61.

(6) *Madat Khan v. Emperor* A.I.R. 1927 P.C. 26.

(7) *Charter Singh v. Public Prosecutor* 1 M.C. 132.

(8) *Asiah binti Baginda Raja v. Public Prosecutor* 1 M.C. 153.

CRIMINAL REFERENCE to the Court of Appeal.

N. Sharma for the appellants.

A. P. Jack (Federal Counsel) for the respondent.

Mathew C.J. (delivering the judgment of the Court): — This is a Criminal Reference under section 34 of the Courts Ordinance 1948, on a Certificate of the Public Prosecutor. The point for determination is whether the joint trial of cross-summonses is an illegality or an irregularity. We propose, as did the learned judge who heard the appeal from the Magistrate's decision, to ask ourselves the question whether the defect which occurred in the proceedings in the Magistrate's Court was or was not curable under section 422 of the Criminal Procedure Code.

The grounds of judgment have been set out with admirable clarity by the learned judge, and he has reviewed all the relevant authorities. As a result, our task has been rendered considerably easier. The case itself is of little consequence, as it concerns a trifling quarrel between women, but the principle involved is of considerable importance.

The procedure followed by the Magistrate was to hear case PP. 2080/53 first. The accused was represented by Mr. Mahendran who cross-examined the complainant and all his witnesses. At the close of the case for the prosecution the Magistrate made the following note: "Complainant in PP. 7/54 to state her case and answer the charge". The two complainants and one defence witness in PP. 7/54 were then examined and cross-examined by Mr. Jayaretnam who appeared for the complainant PP. 2080/53. The Magistrate then found Kamala (Thulli) and Papathy guilty.

The Magistrate cannot have acted under section 170 of the Criminal Procedure Code which lays down when persons may be tried together. Illustration (d) — "A & B being members of opposing factions in a riot should be tried separately" — makes it perfectly clear that there must be community of purpose before the actions of accused persons can be regarded as parts of the same transaction. A's purpose is to assault B's party and B's purpose is to assault A's party. Their purposes are completely opposed and therefore there is no community of purpose. In the present case, one side alleges that abusive words were used by the other side with intent to cause a breach of the peace and makes it the subject of a private prosecution. The other side retorts by launching a counter-private-prosecution, and in effect alleges that the boot is on other leg. These are two separate complaints each entitled to be treated separately. This case cannot be regarded in the light of section 170, for it is manifest that the parties to the quarrel which gave rise to the charges we are now considering could not have been jointly charged and tried. The only question is, was the trial conducted in a manner different from that provided by the Criminal Procedure Code? (*Pulukuri Kotayya v. King-Emperor*[1]). Reference to the Indian authorities shows that what are known as simultaneous trials are permissible, provided the accused is not prejudiced and injustice caused.

The expression 'simultaneous trials' however, has been used in India, not as meaning the kind of case now before us in which the various witnesses and accused were all in Court at the same moment, but rather to indicate entirely separate trials held at different times during the same period, so that one trial is not completely finished before the other begins. The decisions of the Indian Courts can be properly understood only if this meaning of the word 'simultaneous' is kept clearly in mind

It is strange that the question of simultaneous trials should be dealt with under section 239 of the Indian Criminal Procedure Code, which deals with what persons may be charged jointly, when it is quite apparent that persons who make counter-charges could never be charged and tried together. The only thing that has ever been permitted under the Indian Code (section 239) is "simultaneous" but separate trials. Paragraph 19 on page 1486 of vol. 2 of the A.I.R. Commentaries on the Indian Criminal Procedure Code, reads :—

"Simultaneous but separate trials of different accused persons for offences committed by them and not forming part of the same transaction are not bad unless the accused are prejudiced by the course adopted."

The case of *Dhako Singh v. Emperor*[2] is particularly helpful, as it reviews the cases from *Queen v. Sheikh Bazu*[3] down to the case of *Sahadev Ahir v. Emperor*[4] on which the effect of *Subrahmania Ayyar v. King-Emperor*[5] was considered on the very point now before us. The established view now held in India is that "the holding of simultaneous trials in counter-cases is not barred" — (the underlining is ours).

There is a world of difference between what is known in India as a simultaneous trial and what happened in the cases at present under review. We will cite two examples to indicate what is meant by simultaneous but separate trials.

Sahadev Ahir v. Emperor[4], (at p. 344):—

"In two cross-cases of rioting and grievous hurt a magistrate tried the cases separately but almost simultaneously, that is, the magistrate examined the witnesses in one case on certain days and the witnesses in the other on certain other days and examined some of the accused in the one case as witnesses for the prosecution in the other, and after framing charges against the accused in the one case on a certain day framed charges against the accused in the other case on a different day and subsequently heard the arguments in both the cases on one and the same day, separate judgments being given in each of the cases".

In *Dhako Singh v. Emperor*[2], two counter-cases of rioting were heard simultaneously, but there were separate charges, separate trials and separate judgments. So much were the cases left apart that the learned judge on appeal said (at p. 179):—

"The judgments of the Courts below have based their findings entirely upon the evidence in this case and when reading them, one would not dream even of the existence of a counter-case."

If counter-cases of this kind are to be successfully attacked, the result must be that no counter-cases should be tried at all.

We would refer to one other case: *Madat Khan v. Emperor*[6] where:—

"Two parties were charged for attacks on each other in the same occurrence. The two cases were tried separately at two distinct trials but the High Court gave one judgment. The appeal was dismissed, and Viscount Haldane said (p. 27): ". . . although technically it might have been better to keep the evidence entirely distinct, and to have delivered two separate judgments, no injustice has followed from what was done."

There was in this case only a slight and comparatively unimportant departure from the general rule that for each distinct offence an accused person is entitled to a separate trial.

In the proceedings before the Magistrate there is no question of separate and distinct trials. The appellants at the end of the case for the (private) prosecution in PP. 2080/53 were both called upon to answer the charge which had been preferred against them and to state their complaint in PP. 7/54. They entered the witness-box in the dual capacity of accused persons and witnesses for the prosecution. It was doubtful that the complainant in PP. 2080/53 was ever charged in respect of the complaint in PP. 7/54.

We have no doubt in our mind that the procedure followed was in plain contravention of the provisions of the Criminal Procedure Code, and we see no reason to differ from the decisions in *Charter Singh v. Public Prosecutor*[7] and *Asiah binti Baginda Raja v. Public Prosecutor*[8] which laid down that procedure such as was followed by the Magistrate in the present case is bad. To list the irregularities which flow from this form of procedure is unnecessary. The case cannot be held to have been tried substantially in accordance with the provisions of the Criminal Procedure Code and is therefore a bad trial. It is a procedure which on first sight appears to have been permitted under the Indian Criminal Procedure Code on which our Code is based, but an examination of the Indian authorities shows that such a procedure as was followed in the present case has never received the blessing of the Indian Courts. The procedure now approved in India in relation to the trial of counter-charges makes it clear that counter-charges must be tried separately, and that any attempt to dispose of the two counter-charges at one hearing by the Court is absolutely prohibited.

The question of prejudice to the appellants does not require to be considered, as the procedure followed by the Magistrate was not in accordance with the clear provisions of the Criminal Procedure Code, and, therefore, the trial was bad and cannot be cured by recourse to section 422 of the Criminal Procedure Code.

We allow the appeal from the Magistrate and order the fines, if paid, to be refunded to the appellants.

Appeal allowed.